The complaint was originally filed in the Court of the Senior Inspector of Mines, Kuala Lumpur, but was transferred for trial to this Court.

I have no doubt that at the time the complaint was filed the respondent had committed breaches of the sub-lease as alleged. However, under section 97 (ii) of the Mining Enactment the Warden or Court, as the case may be, has a discretion as to whether the sub-lease shall be cancelled or not. My reading of section 97 of the Mining Enactment is that if it has been proved that the sub-lessee has failed to observe the conditions referred to in paragraphs (a), (b), (c) and (d) of sub-section (ii) of section 97, the lessors are entitled to an order of cancellation unless the sub-lessees can show that there are reasons why the Senior Inspector of Mines or the Court should exercise discretion in favour of the sub-lessee.

In March, 1954, the respondents employed one excavator to build a bund on the land for approximately 12 days, and intermittently from June, 1954 to November, 1954. I accept the evidence of Mr. Percival Ewan Waugh that putting one excavator on the land is not implementing a mining scheme. The excavator was re-employed from April, 1955 up to the time of the trial. This, again, cannot be considered as implementing a mining scheme. In June, 1955, after the complaint was filed, the respondents employed on the land one bulldozer and a conveyor belt. According to Mr. Hazlitt, who gave evidence for the respondents, the mining scheme had been in operation since the beginning of April, 1954, and the labour requirements of the land have been fully met. This implies that the mining scheme was not in operation before April, 1954, and that prior to that date the labour requirements were not fully met.

I quite appreciate that there may be reasons why since the 28th May, 1954, there may have been difficulties which delayed the respondents in commencing mining operations. For these reasons, and in order to discover whether the respondents have done everything they could in order to start mining operations I think it is necessary to consider the whole history of the case.

The sub-lease was originally granted in 1937, and in accordance with the evidence of Mr. Hazlitt the first real step to mine was in March, 1954. It is obvious that nothing was done prior to the Japanese occupation. What could or could not have been done during the Japanese occupation I do not know, and I disregard that period from my considerations. I also disregard the period from 1946 until the end of the moratorium because, although it is possible the respondents could have obtained leave from the Mines Department to mine for that period, it has not been proved to my satisfaction that this was necessarily so. It is, however, clear that the respondents made no effort to mine from the end of 1949 until 1954.

Apparently, at some time during this period the complainants made a prior application for cancellation of the lease, but the record of that trial is not traceable and I do not know what happened except that I have been informed that the claim was withdrawn. I do not consider that this precludes me from taking into consideration the dilatory conduct of Eu Tong Sen and the respondents in considering whether the discretion of the Court should be exercised under section 97 of the Mining Enactment.

I have come to the conclusion that this complaint must succeed. I therefore give judgment for the complainant with costs and order that the mining sub-lease 4181 be cancelled.

Judgment for the Complainant.

Solicitors: *Bannon & Bailey; Shearn, Delamore & Co.*

Re THIALMUTHU DECD.; RAJARATNAM v. SUBRAMANIAM

[O. C. J. (Buhagiar J.) July 30, 1955]

[K. L. — Probate No. 1 of 1955]

Will — Undue influence — Onus of proof.

Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean.

Cases referred to:—

(1) *William Low v. James Guthrie* (1909) A.C. 278.

(2) *Craig v. Lamoureux* (1920) A.C. 349.

PROBATE.

K. J. E. T. Marsh for the plaintiff.

M. Edgar for the defendant.

Buhagiar J.: — The plaintiff claims to be Executor of the last will dated the 9th day of February, 1952, of Thialmuthu also known as Thaial Muthu daughter of Arunasalam late of No. 9A, Bukit Bintang Road, Kuala Lumpur, deceased who died on the 6th day of April, 1952 and to have the said will established.

The defendant lodged a caveat in the High Court, Kuala Lumpur, against a Grant of Probate being made to the plaintiff.

In the statement of defence the defendant contended that:—

(a) the deceased was an illiterate person, who could neither read nor write Tamil or English and as such the contents were not explained to her by a competent person, and if the will had been explained to her, she would not have executed it;

(b) the deceased was not in her proper senses when she executed the will, as her health from 1950 onwards had deteriorated and she was over seventy years of age.

During the hearing, at the close of the case for the plaintiff counsel for the defendant applied for and counsel for the plaintiff did not object to, an amendment to the statement of defence by the addition of the following paragraph :—

"That the deceased was under the influence of the plaintiff when she executed the will and that the said will is not the expression of the said will of the deceased."

With regard to the defendant's contention that the deceased was not in her proper senses when she executed the will, this was not supported by the evidence. On the contrary all the evidence tends to show that although the deceased was not enjoying good health for some time before her death she was not suffering from any mental disability. She spoke intelligently; she was suffering from some of such physical disabilities as are due to an advanced age.

There is evidence to support the contention that the deceased was an illiterate person who could neither read nor write Tamil or English; but I was satisfied from the evidence that the will was duly and properly explained to her, that she understood the contents of the will and that she executed it knowing well the purport of the document. S. Subramaniam (P.W. 3) speaks English well and is fully capable of explaining the simple and plain contents of the will in question. He is a reliable witness and I am satisfied from his evidence that the deceased understood what she was about to execute. This witness stated that when the deceased had executed the will she said: "He (referring to the plaintiff) has earned it and he knows how to use it."

With regard to the contention that the deceased was under the influence of the plaintiff when she executed the will, I did not consider, having gone through the evidence, that the defendant has discharged the burden on him of proving undue influence (see *William Low v. James Guthrie*[1] and *Craig v. Lamoureux*[2]). In the latter case Viscount Haldane at p. 357 said: "Undue influence, in order to render a will void, must be an influence which can justly be described by a person looking at the matter judicially to have caused the execution of a paper pretending to express a testator's mind, but which really does not express his mind, but something else which he did not really mean." I do not consider that the fact that instructions to the solicitor for the drafting of the will were given in detail by the plaintiff forms in the circumstances of this case a just ground for suspicion. But in any case I am fully satisfied that no undue influence was exercised on the deceased and that the deceased understood the document she executed and that the will expressed her mind.

I therefore gave judgment for the plaintiff with costs holding that the plaintiff is the executor of the last will of the deceased and that will is established.

Claim allowed.

Solicitors: *Shearn, Delamore & Co.; Bannon & Bailey.*

A. DICKINSON v. PUBLIC PROSECUTOR

[A. Cr. J. (Bellamy J.) December 14, 1954]

[K. L.—Criminal Appeal No. 87 of 1954]

Criminal Procedure Code (Cap. 6), ss. 305 and 310 — Application to amend Petition of Appeal out of time — Principles to be applied in dealing with such applications.

This was an application by motion under s. 310 of the F.M.S. Criminal Procedure Code for an order that a petition of appeal filed in the appeal be amended by adding new grounds of appeal. The appellant had pleaded guilty to a charge of driving a motor car whilst under the influence of drink to such an extent as to be incapable of having proper control of the said vehicle, an offence under s. 6(1) of the Motor Vehicles (Driving Offences) Proclamation. He was sentenced to one month's imprisonment and disqualified from holding a driving licence for one year. Notice of appeal was lodged by the appellant and in due course the appellant lodged his petition of appeal after he was served with the grounds of decision of the learned President. This petition of appeal was settled by an experienced member of the Federation Bar and was based on two grounds relating to the sentence imposed. Subsequently the appellant's solicitor filed the motion to amend the petition of appeal. The proposed amendments read: "3. That the learned President erred in law in convicting the accused in the complete absence of an essential ingredient to the offence namely any evidence that the extent of the intoxication was such as to render the appellant incapable of having proper control of his motor car. 4. That the learned President was wrong in law in not amending the plea of guilty . . . when the appellant made a statement in mitigation which was inconsistent with his plea of guilty. 5. That the learned President erred in law in not calling for evidence or information regarding the background antecedents and character of the appellant before passing sentence upon him."

Held: (1) in applying for leave to amend a notice of appeal and/or petition of appeal out of time the appellant must satisfy the Court firstly that circumstances exist which justify an extension of time and secondly that he has a reasonable prospect of success on the appeal on the new matters which he is desirous of raising at the hearing of the appeal by the proposed amendment; (2) in this case there were on the facts no circumstances which would justify an extension of the time; (3) on the facts of the case there were no merits in the application as s. 305 of the Criminal Procedure Code precluded an accused person who has pleaded guilty and been convicted by the Court from appealing against conviction.